COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

SETTLERS LANDING REALTY TRUST, Appellant	)	
v.	)	No. 01-08
BARNSTABLE BOARD OF APPEALS, Appellee	)	

ORDER

In August 2000, the developer, Settlers Landing Realty Trust, submitted an application to the Barnstable Board of Appeals for a comprehensive permit to build 56 single-family, affordable homes. In May 2001, the Board granted the permit, subject to conditions, including that the development be reduced to 36 single-family homes. The developer filed an appeal with this Committee in June 2001.

After unsuccessful negotiations, on May 1, 2002, the developer filed a Notice of Project Change pursuant to 760 CMR 31.03(1), and changed its proposal from a 56-unit single-family ownership development to a "168-unit attached townhouse for-sale development, to be restricted to residents age 55 and older." As a result, the matter was remanded to the Board, and on April 16, 2003, the Board issued a second decision.[1] That

1. Throughout this order I will refer to the decision on remand, that is, the Town of Barnstable Zoning Board of Appeals M.G.L. Chapter 40B Comprehensive Permit Decision and Notice, filed with Town Clerk April 16, 2003, as the "Decision."

Decision permitted the construction of 44 family housing units, either as single-family homes or attached multi-family units. Decision, p. 14, ¶18.

When the Decision was issued, the parties immediately requested that the Committee provide clarification as to whether that Decision constituted a grant of a comprehensive permit subject to conditions or a denial. Our regulations establish different burdens of proof depending on whether the permit has been denied or granted with conditions. Therefore, it is important for the efficient and fair conduct of the hearing to resolve this question before the evidentiary portion of the hearing begins.

The first question to be answered in this case is what proposal was before the Board for consideration. Several proposals have been considered at different times by the parties. But on remand, we see no indication that the developer intended to present two alternate proposals. In fact, under most circumstances, that would be improper. General land use permitting principles allow the developer to place a proposal before a board, and require the board to approve or reject it. Though it is common for the parties to consider alternatives or even entirely different proposals during informal *negotiations*, the developer cannot *require* the board to formally respond to two or more entirely different proposals simultaneously, nor can the board *require* the developer to submit a second, different proposal. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee Jun. 25, 1992). Here, after the Notice of Project Change and remand, it is clear that the proposal before the Board was the 168-unit multi-family development.[2]

2. The section of our regulations which permits changes in the proposal during the appeal process assumes that even when there are substantial changes made, the original application remains intact, and "[o]nly the changes in the proposal… shall be at issue in [the remand] hearing." 760 CMR

The second question is whether the 168-unit proposal was approved with conditions or denied. As a general matter, it is certainly permissible for a board to impose a condition that limits the size of a development when that is necessitated by the site or the surrounding area. *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 10, n.4 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002). Historically, when such conditions have been imposed, developers have in nearly all cases accepted the decision at face value rather than asserting that the decision was in effect a denial of the permit. See, e.g., *Archstone Communities Trust v. Woburn*, No. 01-07 (Mass. Housing Appeals Committee Jun. 11, 2003); *9 North Walker Street Development, Inc. v. Rehoboth*, No. 99-03 (Mass. Housing Appeals Committee June 11, 2003). But even though the situation has rarely arisen, it is equally true that the Committee has taken the position for many years that an arbitrary reduction in the number of units may constitute the denial of a permit. In fact, in *dictum*, the Committee (perhaps overstating its position) has gone so far as to say, "a reduction in the number of units, whether done in the decision itself… or… as a condition, is always, in fact, a denial of the original application…." *Georgetown Housing Authority v. Georgetown*, No. 87-08, slip op. at 21-22 (Mass. Housing Appeals Committee Jun. 15, 1988). The more balanced view is that when a developer challenges a board

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31.03(1). In this case, however, the changes in the proposal were so extensive that in my Order of Remand and Amended Order of Remand, I required that a new, full application be filed, that a new or updated project eligibility letter be obtained pursuant to 760 CMR 31.01(2), that abutters receive notice "as though this were a new… application," and that an additional local filing fee be paid. Order of Remand (May 15, 2002), Amended Order of Remand (Jul. 12, 2002). The parties treated the change as a new application, and nine local hearing sessions were held.

In the Decision, the Board alternately describes the documents filed with the Board after the remand as "an application for a Comprehensive Permit for Parkside Village Condominium (the Remand)" and "an application for modification of the Settlers Landing comprehensive permit granted by the Board on May 2, 2001," and, in part at least, it couched its decision in terms of a

decision that significantly reduces the number of units in the development, the appropriate course is to review the decision to determine whether it manifests a reasonable basis for the reduction.

The Decision in this case contains 18 findings of fact and 29 conditions containing many details and subparts. The concluding finding is that the 168-unit proposal is not consistent with local needs, and the first condition is that the development be limited to 44 units. Decision, p. 14, ¶ 18; p. 15, ¶1. The most prominent and significant local concerns raised in both the findings and the conditions relate to wastewater disposal and to density and open space.[3] The Decision, however, draws no logical connection between these concerns and the elimination of 124 units.

For instance, finding 6 indicates that the proposed wastewater treatment system for 168 units would result in nitrogen loading in the area of groundwater recharge of between 5.87 and 6.43 ppm, which exceeds the local standard of 5.00 ppm. First, although one of the central purposes of the Comprehensive Permit Law is to allow waiver of the local standard under appropriate circumstances, there is no discussion of the pros and cons of such a waiver or even of the considerations that might go into such a decision. But second, and more important, the Board draws no logical connection between its apparent desire to meet the

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denial of a request for a modification. See Decision, p. 2, p. 10, ¶ 2, p. 14, ¶ 18. Whatever terms were used, however, in effect there was a new application and a new local hearing conducted.

3. A third prominent concern was that the development be available to families rather than restricted to people aged 55 and over. This, however, seems entirely unrelated to the size of the development. A condition requiring that the housing be available to families does not render the Decision a denial, and in fact, from the analysis in the Decision, it appears that such a condition may well be upheld when the issue is addressed during a hearing on the merits. See Decision, pp. 11-13, ¶¶ 7-10, 12-13.

5.00 ppm standard and the condition reducing the size of the development.[4] On the contrary, to reach the 5.00 ppm standard, nitrogen loading would have to be reduced by about 22%, but the reduction of the development to 44 units is about a 75% reduction. Though an accurate assessment of the effect of the unit reduction on nitrogen loading obviously would require detailed scientific analysis, common sense tells us that wastewater generation is proportional to number of units, and that it is not likely that a 75% reduction in units is necessary to reduce nitrogen loading by 22%.

Similarly, with regard to density, the findings briefly describe surrounding neighborhoods and the open space recommendations of the town's comprehensive plan. Decision, pp. 12-13, ¶¶ 10, 11. But no logical connection is drawn between these and the limitation of the development to 44 units. The Decision also notes that the proposed development is as close as ten feet from the property line and implies strongly that there is insufficient open space. Decision, p. 13, ¶ 11. Addressing this concern is certainly likely to result in a reduction in number of units. But, again, there is no logical connection between the concern and a dramatic reduction to 44 units. In fact, with regard to the setback, the Board actually appears to have taken an appropriate approach in that condition 8 requires a 25-foot buffer around the entire site.[5] Decision, p. 16, ¶ 8. It could have done the same with open space concerns by requiring a specific increase in open space. It could either have simply stated the requirement (as it did in condition 8 with regard to the buffer), and allowed

4. Finding 5 states that under local requirements, a private, on-site wastewater treatment plant would not normally be allowed on this site. It does not appear, however, that this is at the crux of the Board's concern since condition 10 allows the use of such a treatment plant. Decision, p. 10, ¶ 5; p. 18, ¶ 10.

5. This sort of condition is certainly appropriate to protect neighboring properties, though without detailed evidence before me, I cannot at this point express an opinion as to whether this specific setback is justified in this case.

the developer to redesign the proposal (presumably reducing the number of units somewhat), or it could have performed a more detailed analysis itself, and determined where units should be eliminated and open space provided. But in either case, it is difficult to imagine that 124 units would have been lost.

I find that the Decision of the Board failed to articulate a reasonable basis for the dramatic reduction in size of the proposal, and it is therefore deemed a denial of the developer's application to build a 168-unit multi-family housing development. Burdens of proof during the hearing before the Committee will be allocated accordingly, pursuant to 760 CMR 31.06.

Housing Appeals Committee

Date: 9/22/03

Werner Lohe, Chairman
Presiding Officer

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